UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HUBER SPECIALTY HYDRATES, LLC,	)	
	)	
Respondent,	)	
	)	
And	)	Case 15-CA-168733
	)	
	)	
UNITED STEELWORKERS, LOCAL 4880,	)	
	)	
Charging Party	)	
	)	Cases 15-CA-177324
And	)	15-CA-179549
	)	
	)	
BRANDON HARMON,	)	
	)	
An Individual	)	

RESPONDENT'S POST-HEARING BRIEF

NOW COMES Huber Specialty Hydrates, LLC, Respondent herein, and files its post-hearing brief as follows:

STATEMENT OF CASE

United Steelworkers, Local 4880 (Union) filed the initial charge in this case on February 1, 2016, alleging that Respondent had violated §8(a)(5) of the Act by unilaterally implementing a modified attendance policy. Subsequent charges were filed by Brandon Harmon, an individual, alleging that Respondent violated §§ 8(a)(1) and (3) of the Act by allegedly threatening him and thereafter issuing him a written warning for engaging in protected concerted activities. The Regional Director issued a complaint on May 31, 2016, and a consolidated complaint on September 29, 2016. Respondent filed timely answers denying the material allegations of the complaints and raising certain affirmative defenses. This case was heard on April 6 and 7, 2017,

in Little Rock, Arkansas, before Administrative Law Judge Christine Dibble. Respondent now files its post-hearing brief.

STATEMENT OF FACTS

A. Background

The Bauxite, Arkansas facility was originally owned and operated as a bauxite refinery by Alcoa Corporation. In 1996, because of the cost involved in mining the bauxite ore, Alcoa ceased its bauxite refinery operations and became a specialty alumina producer. The business struggled, and the employee complement declined from roughly 1600 employees to 400 employees. In 2004, Alcoa sold the business to Almatis. Throughout this time period, dating back at least to 1973, the Union has represented the production and maintenance employees at the facility. In April 2012, Respondent, who was one of Almatis's customers, acquired a part of Almatis's Bauxite operations. Almatis continued to operate a separate part of the facility. Respondent produces a very fine (one micron) alumina trihydrate material, which has flame retardant characteristics and is used in the paper and wiring industries. When Respondent acquired the specialty hydrates part of the facility in April 2012, what previously had been a single bargaining unit became two bargaining units. Approximately 50 employees of Respondent are in the bargaining unit. A separate collective bargaining agreement was negotiated for the employees acquired by Respondent, although this agreement substantially mirrored the Almatis contract. Albany Bailey, an employee of Respondent, has at all material times been the President of the Union and has responsibilities for both units. (Tr. 22-23, 72-73, 173-180, Resp. Exh. 5).

B. The Initial Attendance Policy

The attendance policy in place prior to February 2016 was one that essentially had been in place when Huber acquired the operations from Almatis. (Jt. Exh. 2). It is an "occurrence" policy, which provides employees with a specified number of "occurrences" (absences/tardies)

that are permitted before a schedule of progressive discipline begins. With the exception of certain absences that are deemed "non-chargeable" (e.g., holidays, vacations, leaves of absence), all absences, regardless of reason, are deemed chargeable. Each full-day absence counted as one occurrence, except that multiple-day absences related to the same condition only resulted in a single occurrence, provided the absences were medically certified. Tardies and leave earlies resulted in ½ occurrence. The policy included a progressive discipline track based on a rolling 12-month period, whereby an employee would be issued a verbal warning after 5 occurrences, a written warning after 6 occurrences, a one-day unpaid suspension after 8 occurrences, a three-day unpaid suspension after 10 occurrences, and would be discharged upon reaching 12 occurrences. Because an occurrence would "roll off" after 12 months, employees could move up and down the disciplinary track. For example, consider the following hypothetical employee:

Date	Event	Occurrences	Discipline
February 1, 2014	Absent	1	None
March 3, 2014	Absent	2	None
March 11, 2014	Absent	3	None
April 15, 2014	Absent	4	None
April 17, 2014	Tardy	4 ½	None
May 6, 2014	Absent	5 ½	Verbal
June 19 2014,	Absent	6 ½	Written
July 23, 2014	Absent	7 ½	None
August 29, 2014	Tardy	8	1-day
October 1, 2014	Absent	9	None
November 18, 2014	Absent	10	3-days

January 27, 2014	Tardy	10 ½	None
February 1, 2015	Roll-Off	9 ½	None
March 3, 2015	Roll-Off	8 ½	None
March 6, 2015	Absent	9 ½	None
March 10, 2015	Absent	10 ½	3-Days
March 11, 2015	Roll-Off	9 ½	None
March 21 2015	Absent	10 ½	3-days
April 1, 2015	Tardy	11	None
April 9, 2015	Absent	12	Discharge

The policy also contained a "Call-Off Procedure," which required employees to "provide as much advance notice as possible to their immediate Supervisor in order to allow sufficient time to provide proper coverage." A separate disciplinary track applied for violations of the call-off procedure. Specifically, the first violation resulted in a written warning, the second resulted in a one-day unpaid suspension, the third resulted in a three-day unpaid suspension, and the fourth resulted in termination. As with the occurrence policy, warnings rolled off after 12 months.

C. 2015 Negotiations and Agreement

In early 2015, Respondent and the Union engaged in negotiations for a new collective bargaining agreement. During these negotiations, the Union made two proposals regarding the existing attendance policy. The first of these proposals was to modify the policy's provisions regarding tardiness such that an employee who was tardy for less than one hour would only be charged ¼ occurrence. Under the existing policy at the time, an employee who was tardy for less than one hour would be charged ½ occurrence. The second Union proposal was to include the attendance policy as part of the collective bargaining agreement. (Resp. Exh. 1). The Union's

stated purpose in proposing to include the attendance policy in the CBA was to prevent Respondent from being able to change the policy during the term of the CBA. Respondent rejected both proposals, and the Union subsequently withdrew them. (Tr. 74-77, 183-185, 299).

The management rights clause (Article 4.01) was also a topic of discussion during the 2015 negotiations. The existing article provided:

> Except as may be limited by the provisions of this Agreement, the operation of the plant, and the direction of the working forces, including the right to hire, lay off, suspend, dismiss and discharge any employee for proper and just cause and to assign employees to tasks as needed are vested exclusively with the Company. This includes the right to adopt reasonable rules and policies subject to at least seven (7) days' notice prior to implementation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union's right to promptly grieve the reasonableness of any such rule or policy. However, as the parties have a joint interest in and obligation for workplace safety, drug and alcohol testing will be performed pursuant to the agreed upon policy. *The Company will offer employees a last chance agreement in lieu of termination on one occasion unless the employee was in fact impaired on the job. The Company will continue to apply the existing Employee Policy Book.*

(Resp. Exh. 2; Resp. Exh. 5, p. 7).

During the 2015 negotiations, Respondent proposed to delete the final two (italicized) sentences in this article. After discussion, the parties agreed to delete the last sentence, but not the preceding sentence regarding last chance agreements. (Jt. Exh. 1, p. 4). Thus, the 2015 CBA no longer required that the Company "continue to apply the existing Employee Policy Book." (Tr. 77-79, 185-186

The 2015 CBA contains other provisions relevant to this case. Article VII (Jt. Exh. 1, p. 8) recognizes Respondent's right to discipline employees for cause, and the "employee's right to grieve the discipline and to have Union representation." Article X (Jt. Exh. 1, pp. 15-17) addresses "Hours of Work." Subsection 1 (d) provides:

> Consistent with business needs, the Company will have the right to adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods.

D. The Parties' Application Of Article 4.01

Respondent has consistently interpreted Article 4.01 as authorizing it to adopt new rules and policies and to modify existing rules and policies, provided that it gives the Union at least seven days' notice and an opportunity to provide input, and provided further that the new or revised rule or policy does not conflict with the CBA. If the Union contends that the rule or policy is unreasonable, its recourse is to promptly grieve the reasonableness of the rule or policy. In accordance with this interpretation of Article 4.01, Respondent followed this procedure in modifying an existing cell phone policy and an existing safety shoe policy, and in adopting a new tobacco policy. (Tr. 79-80). Albany Bailey agreed that Respondent had the right to implement these revised policies because they were "reasonable." (Tr. 80).

E. Revising The Attendance Policy

In the latter part of 2015, as a result of increasing attendance issues, Respondent began contemplating modifications to the attendance policy. The policy went through a few internal revisions, at which time it was presented to the Union at the December 17, 2015 central committee meeting, which is a monthly labor-management meeting in which Respondent and the Union discuss any outstanding issues. (Jt. Exhs. 3, 4, 5). Human Resource Manager Jessica Rowan reviewed the draft policy with the Union and pointed out the major changes from the existing policy. These changes included the following:

1. Adding provisions (a) requiring employees to clock in no more than 30 minutes before their shift and to clock out no more than 14 minutes after the end of their shift; (b) authorizing discipline for working unapproved overtime; (c) requiring employees to wait for

relief to arrive before leaving their work area at the end of the shift, unless the supervisor was notified;

2. Adding a provision requiring employees to personally contact their supervisor, or manager, if they were going to be absent;

3. Modifying the disciplinary track for "No Calls/ No Shows" from four steps to three steps, but adding a provision permitting management to "consider extenuating circumstances" when determining discipline;

4. Specifying that once overtime was accepted, the employee's failure to work the overtime would result in an occurrence (existing policy allowed employee to change mind provided one hour advance notice given);

5. Modifying the disciplinary track for occurrences from five steps to four steps (eliminating 3-day suspension);

6. Reducing the number of occurrences for discharge from 12 to 8;

7. Permitting management to discharge "habitual offenders" even if they did not reach 8 points;

8. Requiring employees to furnish a Return to Work statement before returning to work "after an absence for 3 or more days due to an illness or injury."

The Union raised a number of concerns during the December 17 meeting, including concerns regarding removal of the 3-day suspension level, the reduction in the number of occurrences required for each step of discipline, the changes in the call-off procedure, and the provision regarding "extenuating circumstances." During the meeting, the Union acknowledged that the Company had the right to implement, subject to the 7-day notice period and the Union's right to grieve the reasonableness of the policy. (Tr. 64). The meeting ended with the

understanding that the Union would get back to Respondent with any additional input. The stated implementation date at that time was January 1, 2016. (Tr. 32-34, 45-53, 91-92, 103-106, 262-264).

Because of the nature of the proposed changes to the policy, Respondent anticipated that the Union would respond promptly with additional feedback. In fact, however, the Union did not respond at all during the final two weeks of 2016, and because of the intervening holidays, Respondent did not push the issue. Instead, it chose to delay the implementation date. (Tr. 263-264). Upon her return from the holidays, on January 4, 2016, Rowan sent Albany Bailey the following email:

> We haven't heard anything from the union regarding the attendance policy. Do you have any questions/issues (besides the adjustment on current occurrences to the new policy)? Thank you.

Bailey responded by email on the morning of January 5, 2016, as follows:

> We have a few concerns and suggestions. We plan to have them appropriately bargained and/or grieved if necessary.

(Jt. Exh. 6(a)).

Shortly after sending his response to Rowan, Bailey sent a second email to Rowan (and other managers) bearing the subject heading "Cease and desist/attendance policy:"

> On the behalf of the members of United Steelworkers Local 4880 currently employed by Huber Specialty Hydrates LLC, and whereas attendance policies along with any changes in working conditions are mandatory subjects of bargaining, we hereby request that a unilateral implementation of such policies are ceased and that you desist from such actions until after those items have been appropriately bargained.
>
> Please contact our Staff Representative, Michael Martin, to schedule a suitable date, time, and place for discussion of all issues involved with policies, process disputes, and causes for this and other cordial demands.

(Jt. Exh. 6(b), p. 3).

After discussing the issue with Respondent's outside labor counsel, (Tr. 265), Rowan responded to Bailey on January 13, 2016 as follows:

> As you recall management met with you on 12/17/15 for a Central Committee meeting. Following the provisions on Article IV Section 1, the Company notified you of our intent to implement a revised attendance policy. We gave you more than the required 7 days stated in the contract. It's now been 15 days [1] without receiving any specific input from the union. We plan to implement effective 2/1/15 [2] with communication going to all employees prior to this date. If you'd like to give us any input prior to that date, we would be glad to consider it.

Less than 30 minutes later, Bailey responded as follows

> As you recall, in the Central committee meeting, there were several issues/concerns and specifics. Those issues were reiterated to Frank Viguerie by Brian Christian at building 450 during the pannevis extention [sic] installation. Also two provisions of your implementation as we understand them are not legal. The Attendance Policy will be bargained. If you choose not to bargain, we will take appropriate action to correct your unreasonable behaviors. After consulting with the employees, you received notice of cease and desist on January 5th to bargain all issues associated with the proposed attendance policy. It also prompted you to contact our International representative. Please do so immediately. Nothing in the contract precludes you from mandatory bargaining.

(Jt. Exh. 6(b), p. 2).

Rowan and Bailey briefly discussed the issue on the afternoon of January 13, and Rowan agreed to respond yet again, which she did the following afternoon, January 14, 2016:

> As we discussed, the management rights clause is a clear and unmistakable waiver of the company's obligation to bargain over adopting policies. It provides a specific process for providing the union with a week of time to provide any input and the right after implementation to grieve. Without precedent, we will gladly give the union another week (by 01.21.16) to provide any concerns or input they have for management to consider prior to its implementation. Thereafter,

[1] It is not clear where the reference to "15 days" came from, as it had been 27 days since the December 17 meeting.

[2] This obviously should have been 2/1/16.

> we will communicate the revised attendance policy with all employees the following week (01.25.16 to 01.29.16). The policy will then become effective 2.01.16.

This triggered the following response from Bailey, also on January 14:

> Thank you for your brief investigation and follow-up of the legalities involving our meeting. However, we simply did not discuss any "waiver" of the legal obligations concerning the implementation of your rough draft of attendance policy changes. In fact our agreement is far from the clear and concise definition that you have embarked upon in determining the right to bargain any changes in our working conditions. Please look under Article XXIV. Legal rights where it states "Nothing herein shall deprive either party or any employee of any rights or protection granted under any applicable federal or state law." Our contractual agreements do not superseded [sic] the law. That being said we welcome the opportunity for input and reserve our right to bargain any changes subject to the protections under the NLRA, FMLA, and all applications of federal and state law. Our International representative has agreed to bargain on the 28th of this month. If the input we have for you is not an agreeable standard, our obligations are to bargain the changes that you have presented. Again we request and reaffirm that Huber Specialty Hydrates, LLC cease any unilateral change and desist from implementation until bargaining has reached completion.

(Jt. Exh. 6(b), p. 1).

On January 14, 2016, the Union filed a grievance alleging that Respondent was violating Article VII, Section 3 of the CBA[3] as follows:

> The company intends to alter the attendance policy plantwide due to a perceived attendance problem with a small percentage of hourly employees. This is blanket discipline.

The Union requested the following remedy:

> No changes are to be made to the existing attendance policy without explicit agreement between the union and the company.

(Jt. Exh. 7).

[3] This article requires "just cause" for discipline.

Another central committee meeting was conducted on January 20, 2016. The attendance policy was discussed again at this meeting. (GC Exh 2, Tr. 38-39). On January 28, 2016, [4] following a third step grievance meeting, Bailey and Rowan had a discussion in Rowan's office. Using a printed copy of the proposed draft policy, Rowan made handwritten notes regarding points and objections made by Bailey. She also made internal notes regarding management concerns and issues. (Resp. Exh. 12). With respect to the proposed language stating that once an employee accepted an overtime assignment, the employee could not thereafter call off without receiving an occurrence, Bailey expressed the Union's view that this adversely affected the 8-hour employees more than 12-hour employees. Bailey also raised objections to the revised discipline schedule, both with the removal of the three-day suspension and with the reduction in the number of occurrences that would trigger various disciplinary steps. Bailey suggested that another level be added and that the number of occurrences for discharge be increased from 8 to 10. This would have resulted in the following disciplinary track: Verbal warning at 3 occurrences, written warning at 5 occurrences, one day unpaid suspension at 7 occurrences, three-day disciplinary suspension at 9 occurrences, and discharge at 10 occurrences. The Union also raised concerns regarding the proposed Return to Work provision. Finally, the Union proposed that all employees have their attendance records cleared and that they start anew with no occurrences. (Tr. 41-42, 67-68, 266-273).

Following Rowan's meeting with Bailey, Respondent revised the draft policy to address some of the Union's concerns as well as issues that management itself had identified. The most significant change from the draft policy was a revision to the disciplinary track such that a verbal

[4] Brian Christian testified regarding a grievance meeting on January 22, 2016, at which the policy was also discussed. (Tr. 108-109). It is not clear whether this is the same meeting that occurred on January 28.

warning would be issued at 3 occurrences, a written warning would be issued at 5 occurrences, a one-day unpaid suspension would be issued at 7 occurrences, and termination would occur at 9 occurrences. (Jt. Exh. 9). On January 29, 2016, Rowan issued a memorandum to all employees stating that the revised attendance policy, which was attached, would be implemented effective February 1, 2016. Rowan noted that feedback from the Union had been considered. She further stated that "[t]o ensure that employees have a fair opportunity to improve their attendance before experiencing discipline under the revised Attendance Policy, each employee will be credited three and one-half occurrences starting with the most recent occurrences." (Jt. Exh. 8).

F. Brandon Harmon Discipline

The two primary job classifications are bagger and operator. Employees typically start as baggers and progress to operators. Within each of these classifications are three levels: entry, middle, and top. Progression within a classification is based on length of service and proficiency. (JT. Exh. 1, p. 38; Tr. 24-25, 138-139). Brandon Harmon was hired by Respondent in September 2013. He started as a bagger and at the time of the hearing in April 2017, he had progressed to a top operator. (Tr. 125). Production employees work 12-hour shifts, (Tr. 23), except when they are in training, they work an 8-hour shift from 7:00 a.m. to 3:00 p.m. (Tr. 140). At the time of the events in dispute Harmon was an entry level operator, and he was still in training, as he had only been promoted from bagger to operator in February 2016. (Tr. 125-126).

Although each employee has a specific job classification, employees may be temporarily assigned to higher or lower classifications. Thus, Article IV of the CBA grants management the exclusive right "to assign employees to tasks as needed," and Article IX provides that employees who are temporarily assigned to a lower classification will be paid their regular hourly rate. The

CBA contains no provisions requiring Respondent to call overtime or limiting its right to move employees around. (Tr. 82).

G. Events Of May 31, 2016

Craig Parker is the Lead Supervisor on the back end of the plant. He testified that he had two supervisors reporting to him, Chris Skinner and Alex Huell. Parker reports to Jason Smith. (Tr. 201-202). On the morning of May 31, 2016, between 8:00 and 8:15 a.m., because of mechanical problems with a robot in Building 435, Parker instructed Kyle Peterson, who was bagging on the jet mill, to go to Building 435 to assist Benji Cranford with hand stacking until the robot was repaired. At the time, Parker observed that Peterson had completed ten 50-pound bags (two layers) on the pallet he was working on and had enough bags stenciled to complete four pallets. (Tr. 202-204). Parker then proceeded to the control room where the operators are stationed. When he arrived, Chris Skinner was present, as well as several operators, including Brandon Harmon. Parker advised the group that he had pulled Peterson off of the jet mill to assist Cranford, that he was relieving Harmon of his operator duties, and that he needed Harmon to go "bag the jet mill empty." Parker needed the jet mill to be emptied so that production could be transitioned from S-11 to Coat 7 product, which was intended for NGK, one of Respondent's most important customers. (Tr. 126-127, 141-142, 204-207). Harmon raised no objection to Parker and immediately proceeded to the jet mill, where he remained until his 9:00 a.m. break. At that time, he proceeded to the break room, where he encountered employees Justin Lane and Ryan Moore. By his own admission, Harmon was torqued at being sent to the jet mill because he viewed himself as an operator and felt that Parker should have called overtime rather than send him to the jet mill. Harmon voiced his objections to Lane and Moore. (Tr. 146-147).

Before returning to the jet mill, Harmon went to the 450 control room to get a drink. There, he spoke to employees Jake Garner and Rick Jackson, again voicing his displeasure at being sent to the jet mill. Harmon then returned to the jet mill around 9:17 or 9:20 a.m. [5] (Tr. 149). A mere 40 minutes later, around 10:00 a.m., Harmon took an unscheduled break to use the rest room and grab a drink. He was in the control room talking to other operators, when Supervisor Skinner came in and stated, "We need to shut down the number one spray dryer to get ready to transition to another product." Even though Skinner's remarks were not directed specifically to Harmon, he had been given instructions by Skinner's boss to bag the jet mill empty, and there were two other operators in the control room at the time (Jake Garner and Rick Jackson), Harmon apparently volunteered himself to assist Garner with shutting down the spray dryer, which was set to occur at 11:00 a.m. Harmon then proceeded back to the jet mill. (Tr. 129, 149-157). Around 10:30 a.m., supervisor Parker came by the jet mill and asked Harmon how it was going. Harmon responded that it was bagging a little slow, but raised no specific issues or concerns with Parker. Nor did he advise Parker that he planned to go assist in the shutting down of the number one spray dryer, which he did at 11:00 a.m. This process was completed around 11:45 a.m. According to Harmon, with the exception of his 15-minute break at 1:00 p.m., he

[5] It is undisputed that at some point before 1:00 p.m., Harmon had a conversation with Jason Smith regarding his objections to bagging on the jet mill. Harmon placed this conversation around 9:10 a.m. as he was leaving his first break. (Tr. 144). Smith, however, testified that the conversation occurred around noon, immediately after he returned from lunch. (Tr. 241-242). While the timing per se is not particularly important, Respondent contends that Smith's testimony is more credible. Harmon's testimony regarding the chronology of events was all over the place. Smith, on the other hand, was very consistent and certain regarding the timing. Further, as of 9:15 a.m. on May 31, Respondent was not yet aware of any objections by Harmon to doing the bagging job.

remained at the jet mill until his shift ended at 3:00 p.m. At the time he left, the jet mill was nowhere close to being empty. (Tr. 129, 149-158, 207).

Between 11:00 a.m. and noon, while Jason Smith was at lunch, he received a phone call from Harmon. During the call, Harmon indicated that he was not happy at having to bag the jet mill, that he had signed up to be an operator, and that he felt he was taking overtime away from baggers. Smith asked him if he was qualified on the job, and Harmon said that he was. Smith asked if he was receiving operator pay, and Harmon said that he was. Smith then said, "Then please go bag on the machine." When Harmon continued to object, Smith told him that he would come talk with him when he returned from lunch. (Tr. 241-242).

As Smith was returning from lunch, he received a call from Supervisor Craig Parker advising that Harmon was unhappy with his assignment and that Parker had been told by employees that Harmon was trying to get them to file a grievance on missing overtime.[6] (Tr. 244-245). Upon his return, Smith went out into the plant and found Harmon, who was leaving the control room. Harmon reiterated his objections to bagging, including his belief that he was taking overtime from baggers. Smith responded that Harmon was being paid operator pay, he was qualified to run the machine, and there was no reason to call another employee in. Harmon again disagreed, at which point Smith replied, "Hey, Brandon, you know, I need you on the spout, putting the bag on the spout. I don't need you on your phone calling me and other people trying to get them to file grievances and stuff." Harmon denied calling other employees, to which

[6] Parker testified that employee Kyle Peterson told him that Harmon had been making phone calls and that Harmon had approached him about filing a grievance. Parker gave this information to Smith when they spoke on the phone around noon. (Tr. 209-210).

Smith responded, "Well, I been told that you are. I need [you] putting bags on the spout." At that point, Harmon left and headed back to the jet mill. (Tr. 242-246).

H. June 1, 2016

On May 31, 2016, Craig Parker left the facility for the day between 3:30 and 4:00 p.m. When he arrived the next morning (June 1) for a regular 6:30 a.m. meeting, he could not locate any paperwork for the jet mill for the day shift. The baggers are required to complete a productivity report, and although Parker found the report for the night shift, there was no report for the day shift. Following his meeting, Parker went down to the jet mill to assess what work had been performed. From what Parker could determine, only two pallets had been completed. He then approached Harmon and questioned him about the missing report. Harmon stated that there were no report forms available. Parker pointed out that the forms could be printed off the computer. Harmon then printed off a form, filled it out, and gave it to Parker. The report indicated that Harmon had only completed 30 bags at the jet mill. Harmon did not identify any problems that would have hindered productivity. (Tr. 211- 212, GC Exh. 4).

Parker continued his investigation by speaking with the bagger on the night shift, Fitzgerald Williams. Williams had completed one pallet, but had been redirected by the supervisor to other tasks. Williams stated that he did not have any problems completing the one pallet that he finished. Parker then reviewed the jet mill productivity reports for May 29, 30, and 31 to see what had been accomplished on those days, as the same product was being run each day. These reports indicated that on the night of May 29, Williams had bagged 4 pallets of 1000-pound S-11 super sacks totaling 4,000 pounds and 3 pallets of 50-pound S-11 bags totaling 6,000 pounds during 8 hours of “run-time,” with no issues being reported. (Resp. Exh. 9, Tr. 13, 226-229). On May 30, Peterson had bagged 1 pallet of 50 pound S-11 bags (in 2 hours run time) and

had loaded an H-710 railcar. Peterson reported that the material was hard to get out at first, but that after completing 1 pallet, he had been moved to the rail car. Williams had bagged 2 pallets of 50-pound S-11 bags (in 4 hours of run time) and had bagged 15 2200 pound super sacks of PGA-SD. On May 31, Peterson packaged two layers of 50-pound S-11 bags and stenciled enough bags for 4 pallets before being pulled off to help Benji Cranford. Harmon, however, had only completed 30 50-pound S-11 bags in 5 hours of "run time." (Resp. Exh. 6).

Craig Parker discussed the matter with Operations Manager Travas Parker and Production Manager Jason Smith, and they concluded that discipline was warranted. However, all discipline had to be reviewed and approved by Jessica Rowan, who was out of town that day. Both Smith and Supervisor Parker sent emails to Rowan providing information regarding the reasons for the discipline, including Parker's detailed notes and a proposed written warning. Rowan also spoke to Supervisor Parker by phone and she agreed with the decision to issue the discipline as a written, rather than verbal, warning because Harmon appeared to have acted deliberately and there was a negative impact on production. (Tr. 213-216, 247-248, 276-278, GC Exh. 8, Resp. Exh. 7).

Thereafter, Travas Parker and Craig Parker issued the warning to Harmon. Also present was Union representative Oscar Murdoch. The warning reads:

> Mr. Harmon was instructed to bag the jet mill empty, he only bagged 30 (50 lb) bags all shift. Mr. Harmon did not perform the job duties he was asked to do, nor did he notify anyone of any serious problems that would have been causing an issue. Mr. Harmon also failed to fill out any paperwork for this work station. For this reason Mr. Harmon is being issued a written warning.

(Jt. Exh. 11, Tr. 134-135, 188-189, 216-217).

I. Grievances

On May 31, 2016, Brian Christian filed a grievance on behalf of Charles Kirtley alleging that Respondent had violated Article X, Section 2, Paragraph C of the CBA by failing to call overtime in the jet mill. (Jt. Exh. 14). On June 1, Christian filed a grievance on behalf of Harmon alleging that Harmon's warning was without just cause because "his training is not current on the task" and the "jet mill packer is notoriously unreliable. (Jt. Exh. 12). Respondent denied both grievances. (Jt. Exhs. 13 and 15).

ARGUMENT

A. Respondent Did Not Violate The Act By Implementing A Revised Attendance Policy.

The first issue to be addressed is whether Respondent violated § 8(a)(5) of the Act when it implemented a revised attendance policy on February 1, 2016. Respondent contends that no violation has been established and that this allegation should be dismissed.

1. Respondent Fully Complied With Its Contractual Obligations In Implementing A Revised Attendance Policy.

Although the Board normally applies a "waiver" standard in cases involving alleged unlawful unilateral action, a slightly different analysis applies when the collective bargaining agreement contains a specific bargaining procedure to be followed when an employer intends to take certain action. While this analysis bears some similarity to a waiver analysis, it focuses more explicitly on the *procedural* requirements that the employer must satisfy before acting. This seems natural inasmuch as in cases of this nature, the employer's right to act is conditional rather than absolute. Because the parties have agreed to an explicit procedure for addressing the issue, normal bargaining principles go out the window, and the issue becomes one of whether the employer satisfied the procedural conditions set forth in the contract.

In *Howard Industries, Inc.*, 365 NLRB No. 4 (2016), where the complaint alleged that the respondent unilaterally changed its policy regarding gifts, the Board found that no violation occurred "because Respondent implemented the policy change after following the procedure set forth in the collective-bargaining agreement regarding proposing, negotiating and implementing new or modified policies." *Slip op.* at p. 1. There, the agreement provided that the employer would notify the union by email if it wished "to change an existing policy, create a new policy, or modify job performance standards" and the union would have ten calendar days to request bargaining. If the union failed to give timely notice, "the Company may implement the change and the Union waives any arbitration or other legal remedies concerning the creation or modification of the policy." However, if the union made a timely request to bargain, bargaining would commence within ten calendar days and conclude no later than seven calendar days after the first session. "If the parties fail to reach agreement by the end of the time period set above, the Company may implement the new policy or policy change" and "the Union will have the right to grieve the reasonableness of the policy under the grievance procedure." *Slip op.* at p. 2. Pursuant to this provision of the agreement, the employer gave the union advance notice of the change in gift policy on November 6, but the union failed to respond in a timely fashion, and the employer implemented the policy on November 17. On November 19, the union requested bargaining, but the employer declined, citing the union's failure to make a timely request. In analyzing the issue, the ALJ, with Board approval, noted that although it would normally be necessary to assess whether "the union clearly and unmistakably waived its right to bargain," "[t]his case is different, primarily because in Section 1 of Article XXI of the collective-bargaining agreement, the parties created and agreed to a specific procedure that applies when Respondent wishes to change an existing policy, create a new policy, or modify job performance

standards." *Slip op.* at p. 4. Thus, the ALJ concluded that "t]he issue in this case, then, is whether Respondent's decision to implement its Company Gifts to Employees policy on November 17, 2015, is protected by the collective-bargaining agreement." *Slip op.* at p. 4. Because the company complied with the procedure set forth in the agreement, the ALJ concluded that its actions were legally privileged, and the Board agreed.

A similar analysis was applied by the Board in *Ingham Regional Medical Center.* 342 NLRB 1259 (2004). The issue there concerned whether the employer unlawfully unilaterally subcontracted bargaining unit work and laid off employees. The collective bargaining agreement authorized the employer to subcontract, provided that it gave the union 60 days' advance notice and an opportunity "to first discuss the decision and impact." The employer provided the requisite notice and engaged in discussion with the union, after which, it implemented its proposal. In these circumstances, the ALJ, with Board approval, found that "Respondent fulfilled the procedural and discussion requirements spelled out in the parties' collective-bargaining agreement, and that it had no duty to bargain over the decision to subcontract the coders' work." *Id.* at 1262.

Howard Industries and *Ingham* control this case. Here, the CBA granted Respondent "the right to adopt reasonable rules and policies subject to at least seven (7) days' notice prior to implementation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union's right to promptly grieve the reasonableness of any such rule or policy." Union President Bailey acknowledged the Company's right to implement, subject to giving the required notice and the Union's right to grieve the reasonableness of the policy. Thus, the question is not so much whether the Union "waived" the right to bargain as it is whether Respondent provided the Union with at least seven days advance notice and an "opportunity for

input" prior to implementation. The answer to this question is clearly "yes." On December 17, 2015, Respondent provided the Union with a copy of the proposed new attendance policy, and advised the Union that it intended to implement on January 1, 2016. Some discussion occurred during this meeting regarding specific Union concerns, and the Union indicated that it would be back in touch. In fact, however, the Union did not respond at all before the end of the calendar year. In these circumstances, Respondent would have been within its rights to have implemented the policy on January 1, 2016. Nevertheless, because Respondent truly desired to receive the Union's input, it delayed implementation until February 1, 2016. During the month of January, some discussion continued at the January 20, 2016 central committee meeting, as well as on January 28, 2016, following a grievance meeting. Rowan took notes of the concerns, and Respondent made some changes to the policy based on the Union's input before implementing the policy on February 1, 2016. Because the parties negotiated a specific procedure to be followed for implementing rules and policies, and Respondent complied with those procedures, it did not violate the Act by implementing a new attendance policy on February 1, 2016.

2. The CBA Covered The Dispute.

Respondent recognizes that the Board steadfastly has refused to follow the "contract coverage" analysis applied by the D.C. Circuit, *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), the First Circuit, *Bath Marine Draftsmen's Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007), and the Seventh Circuit, *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). Nevertheless, Respondent contends that the time has come for the Board to adopt the "contract coverage" analysis in cases where an employer defends based on an assertion that it possessed a contractual right to take the action it took. Under a contract coverage analysis, it is clear that Respondent's right to implement a new attendance policy was explicitly covered by the CBA,

and that Respondent acted in accordance with the CBA. Thus, the allegation that Respondent unlawfully unilaterally implemented a new attendance policy should be dismissed.

3. The Union Clearly And Unmistakably Waived Any Right To Bargain.

Although a waiver of bargaining rights must be "clear and unmistakable," no specific type of evidence is required, and the waiver need only be established by a preponderance of the evidence. Typically, a waiver is established through specific contract language, course of conduct, or both. The Board's decision in *Provena St. Joseph Medical Center,* 350 NLRB 808 (2007) is highly instructive. There, the issues concerned the employer's implementation of two policies: (1) a staff incentive pay policy and (2) a revised attendance policy. The employer admitted its refusal to bargain, but raised certain defenses. With respect to the incentive pay policy, the employer acknowledged that the collective bargaining agreement did not expressly address incentive pay, but contended that the union historically had acquiesced in the employer's unilateral implementation of incentives. The Board rejected this defense as inadequate to establish a clear and unmistakable waiver of the right to bargain. With respect to the attendance policy, however, the employer relied upon specific language in the management rights clause, which it contended gave it the right to act unilaterally. The Board agreed:

> Application of our traditional standard reveals that several provisions of the management-rights clause, taken together, explicitly authorized the Respondent's unilateral action. Specifically, the clause provides that the Respondent has the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees." By agreeing to this combination of provisions, the Union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements.

Id. at 815.

The combination of provisions in the CBA between Respondent and the Union are at least as compelling as those in *Provena*. Thus, whereas the agreement in *Provena* authorized the employer to "change reporting practices and procedures," the CBA here authorizes Respondent to "adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods." Whereas the agreement in *Provena* granted the employer the right "to make and enforce rules of conduct," the CBA here gives Respondent the right "to adopt reasonable rules and policies." Whereas the agreement in *Provena* authorized the employer "to suspend, discipline, and discharge employees," the CBA here authorizes Respondent "to suspend, dismiss and discharge any employee for proper and just cause" and to discipline employees for cause. There really are no material differences in the language of these contracts that would warrant a different result here than in *Provena.*

The differences in contract language that do exist bolster, rather than weaken, the Union's waiver of rights. Thus, unlike *Provena,* the CBA here provides for a specific procedure to be followed when rules or policies are modified or implemented. Respondent is to give seven days advance notice and an opportunity for input, after which time Respondent may implement and the Union may grieve the reasonableness of the rule or policy. Having expressly agreed to a specific procedure under which it had an opportunity to discuss and provide input, but not "bargain," which procedure was clearly followed, the Union cannot be heard to claim that it possessed bargaining rights in excess of those granted by the CBA.

The parties' bargaining history further confirms the Union's waiver. In evaluating bargaining history, the Board considers whether the matter at issue was fully discussed and whether the union "consciously yielded or clearly and unmistakably waived its interest in the matter." *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). Here, the Union clearly recognized

during the 2015 negotiations that the attendance policy was subject to modification by Respondent. Thus, it made a specific proposal to incorporate the attendance policy into the CBA. The effect of such a proposal, if accepted, would have been to give the policy the force of contract and preclude Respondent from modifying it during the life of the agreement. Respondent rejected the Union's proposal precisely for that reason, and the Union "consciously yielded" on the issue when it withdrew its proposal. The Union also agreed during the 2015 negotiations to delete language from Article 4.01 requiring the Respondent to continue the existing policy manual. This language was included at the time Respondent acquired the operations from Almatis. Although Respondent may have indicated that it was not contemplating any policy changes at the time, that did not mean that changes would not occur in the future.

Union President Bailey's testimony confirms as much. Thus, on cross examination, he acknowledged that Respondent has "the right to implement reasonable policy subject to the grievance procedure" and that the Union acknowledged this to be true in the December 17, 2015 central committee meeting. (Tr. 64-65). The Union, however, did not believe that the changes to the policy were "reasonable." The reasonableness of the policy, of course, is an issue for an arbitrator, not the Board.

Respondent anticipates that the General Counsel may rely upon cases such as *Graymont PA, Inc.,* 364 NLRB No. 37 (2016) and *Merillat Industries, Inc.,* 252 NLRB 784 (1980) to argue that no waiver can be found because Article 4.01 does not explicitly mention "attendance" rules and does not state with particularity the types of rules and policies that Respondent is authorized to implement. Those cases, however, are distinguishable. In *Graymont,* the management rights clause gave the employer the right "to direct its employees; . . . to evaluate performance, . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies

and procedures; [and] to set and establish standards of performance for employees." The Board majority found that this language was not sufficiently specific to waive the union's right to bargain over revisions to the attendance policy, work rules, and progressive discipline. In *Merillat,* the management rights clause merely gave the employer "the exclusive right to hire and fire and to direct the affairs of the Company and to determine its business operations and policies in accordance with the terms of this Agreement." 252 NLRB at 785 n. 9. The Board found this language insufficient to waive the union's right to bargain over new absenteeism and tardiness rules.

Merillat is clearly of little relevance here as the contract language there contained no mention of any right to adopt rules and policies. Indeed, it contained no specificity at all. As for *Graymont,* there are numerous material distinctions in this case. First, as noted above, unlike *Graymont,* the CBA between Respondent and the Union does reference attendance and gives Respondent the right to "adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods." Second, unlike *Graymont,* the attendance policy was specifically addressed during the 2015 negotiations and the Union consciously withdrew its proposal to incorporate the attendance policy into the CBA. The parties also agreed to delete language referencing the old Almatis policy book. Third, unlike *Graymont,* there is record evidence of other changes by Respondent to rules and policies, as well as testimony from the Union that it understood that Respondent had a right to implement reasonable rules and policies.

Another critical distinction here is that the parties agreed to a very specific and detailed procedure for addressing new rules and policies. This procedure included advance notification to the Union, an opportunity to provide input, and the right to grieve the reasonableness of the rule

or policy following implementation. Given the specificity of this procedure, it would make no sense whatsoever to require that the parties identify every type of rule or policy that might be adopted. That is why, as discussed above, the Board applies a somewhat different analysis in cases of this nature and the focus is directed at whether the employer complied with the agreed-upon procedure. Thus, in *Howard Industries, supra*, the Board found that the employer lawfully implemented a new policy regarding employee gifts even though the contract did not make any mention of employee gifts, nor did it specify the types of rules and policies that the employer could implement. Rather, the contract established a specific all-encompassing procedure for addressing new and revised policies, which the employer followed. The same result follows here. Respondent requests that the allegation regarding Respondent's implementation of a revised attendance policy be dismissed.

B. Respondent Did Not Prohibit Employees From Discussing Grievances.

Paragraph 5 of the Consolidated Complaint alleges that Jason Smith "prohibited employees from discussing grievances." This allegation is without merit.

The record reflects that Harmon was agitated and irritated at being sent to the jet mill and that he attempted to sabotage that instruction by finding every excuse he could not to do the work. To this end, Harmon gratuitously "volunteered" himself to assist other operators with a different job than the one he had been instructed to perform. He spent work time attempting to persuade other employees to file a grievance over Respondent's failure to call overtime. He also called Smith complaining about the assignment and resisting all efforts to redirect him back to his job. There is not a shred of evidence that Smith (or any other manager) was concerned with whether a grievance was going to be filed. What he was concerned about was that Harmon was spending all his time doing everything but what he was instructed to do. When Smith told

Harmon, "Hey, Brandon, you know, I need you on the spout, putting the bag on the spout. I don't need you on your phone calling me and other people trying to get them to file grievances and stuff," this was simply a factual reference to what Harmon was doing in place of his job. If Harmon had been wasting time calling employees about sports or politics or any other subject, that is what Smith would have referenced. In context, any reasonable person would understand that Smith was not prohibiting Harmon from filing grievances. He was prohibiting him from doing anything that would distract him from the job to which he was assigned. Further, while employees certainly have a § 7 right to discuss, solicit, and file grievances, even a frivolous one like this one, there is no § 7 right to do so during work time. *United States Postal Service,* 350 NLRB 441, 441-442 (2007); *United Engineering Co.,* 163 NLRB 81, 83 (1967), *enforced,* 401 F.2d 910 (9th Cir. 1968); *Market Basket,* 144 NLRB 1462, 1463 (1963). Of particular significance is the Board's decision in *United States Postal Service,* where the Board held that although "some supervisors made comments regarding the solicitation of grievances that did not clearly specify the circumstances under which the solicitation of grievances was prohibited . . . under the circumstances of this case, 'all concerned understood that the rule was limited to work time on the workroom floor.'" 350 NLRB at 442. Here, Harmon was not even a union steward, and the entire thrust of Smith's remarks to him was that he needed Harmon with a "bag on a spout." He was not prohibiting him from filing or discussing grievances. Respondent requests that this allegation be dismissed.

C. Respondent Did Not Discipline Harmon For Engaging In Section 7 Activities.

Paragraph 6 of the Consolidated Complaint alleges that Respondent issued a written warning to Harmon because he engaged in the protected activity of raising alleged contract violations and soliciting employees to file a grievance over Respondent's failure to call overtime.

There is no question that Harmon was highly upset by his assignment to the jet mill, that he raised his objections with other employees, and that he attempted to persuade employees to file a grievance. Harmon's objections had no plausible contractual basis as nothing in the CBA requires Respondent to ever call overtime. The CBA specifies how overtime will be called, but not whether it will be called. That decision is one that is left exclusively to management's discretion. Of course, that the grievance ultimately filed was frivolous does not render its filing unprotected, as section 7 does not turn on the merits of the activity. However, as discussed above, soliciting other employees during working time to file grievances is not protected activity. The record certainly suggests that Harmon was carrying on his activities at least partially during his working time. This is evident both from his lack of productivity and his own testimony indicating that he absented himself from the jet mill on multiple occasions when he was not on one of his scheduled breaks, which were at 9:00 a.m. and 1:00 p.m. In any event, however, it is not necessary to determine precisely when his grievance solicitation activities occurred because the record fails to demonstrate that the written warning was issued for any reason other than his utter failure to do the job assigned to him.

In alleged discrimination cases, the General Counsel is required to establish "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," at which point, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981). Although sometimes stated in varying terms, the elements of the General Counsel's case include proof that (1) the employee engaged in activity protected by the Act, (2) the respondent was aware of such activity, (3) the alleged discriminatee suffered an adverse employment action, and (4) a nexus

exists between the employee's protected activity and the adverse employment action. *Newcor Bay,* 351 NLRB 1034, 1036 (2007); *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Proof of animus toward the protected conduct is an essential element in establishing that the challenged action was unlawfully motivated. *Whirlpool Corp.,* 337 NLRB 726, 726 (2002).

In analyzing the record evidence, the Board must consider the record in its entirety and not just the evidence that supports the General Counsel. The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack v. NLRB,* 522 U.S. 359, 378 (1998). The evidence in support of a particular conclusion "must be substantial, not speculative, nor derived from inferences upon inferences." *Brown & Root, Inc. v. NLRB,* 333 F.3d 628, 639 (5th Cir. 2003). "The Board may not raise suspicion to status of fact or base inferences upon mere speculation, … and findings of the Board must rest on evidence, not on surmise or suspicion." *Baird-Ward Printing Co.,* 109 NLRB 546, 567 (1954*).*

Even when a prima facie case exists, "[t]he ultimate burden remains . . . with the General Counsel." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). "[A] finding that the General Counsel has met the initial Wright Line burden by making a showing sufficient to support the inference that protected conduct was a motivating factor in [the decision] does not mean that the [decision] was in fact 'unlawfully motivated.'" *Tom Rice Buick,* 334 NLRB 785, n. 6 (2001). The employer bears the burden of establishing its "affirmative defense" by a preponderance of the evidence, but "[n]othing in the Board's Wright Line decision indicates that the employer's burden cannot be met by using circumstantial, as opposed to direct, evidence," *Centre Property Management v. NLRB,* 807 F.2d 1264, 1269 (5th Cir. 1987), and "[t]he

Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it." *Merillat Industries,* 307 NLRB 1301, 1303 (1992).

1. The General Counsel Failed To Establish A Prima Facie Case.

It is undisputed that Harmon suffered an adverse employment action in the form of a written warning, thereby establishing the third element of a prima facie case. However, Respondent contends that Harmon's grievance solicitation activity was primarily during working time and thus not protected by Section 7 of the Act. Further, Respondent clearly believed that this activity was occurring during working time and was hindering his work activities. Thus, the General Counsel has not established either the first or second elements of a prima facie case. However, assuming, *arguendo,* that the first three elements have been satisfied, the General Counsel clearly failed to establish any nexus between any "protected" activity by Harmon and the written warning issued him.

First, there is no proof of any animus by Respondent toward any "protected" activity. The General Counsel undoubtedly seeks to rely on Smith's conversation with Harmon on May 31, but as explained above, Smith was concerned solely with the fact that Harmon was not doing the job he had been assigned, i.e., he needed to have "a bag on a spout." There is not a shred of evidence that either Smith or Craig Parker were upset about the possibility of a grievance being filed. According to Parker, it was not unusual at all for employees to threaten to file grievances over some issue involving the supervisor. Employees would make such statements on a weekly basis. While some of these "threats" were idle, "serious" threats to file grievances happened 2 to 3 times a month. (Tr. 232). When Smith was asked what his concern with Harmon being on a cell phone was, he credibly testified:

> Well, just that he's not able to put a bag on a spout when he's on the cell phone. I mean, if he wants to call people, call me, whoever, you know,

> break times, lunch, after work. He calls when they're not even at work wanting to ask questions and stuff, and I don't mind at all. But the problem is though if – especially for baggers, if they're not paying attention and putting a bag on a spout when they can, then they're not going to get product out.

(Tr. 245-246).

The warning itself, which was drafted by Craig Parker without any revision by Smith or Rowan, focused exclusively on Harmon's failure to bag the jet mill empty as instructed, with no mention at all of his "grievance activities." While Parker's detailed notes make a brief reference to the fact that it had been reported to Parker that Harmon was calling employees and requesting them to file a grievance, nothing in his notes suggests that this was a motivating factor for his discipline. To the contrary, the notes are reflective of a supervisor who was frustrated by an employee who became aggravated by a job assignment and rebelled by doing as little as humanly possible without any viable justification: "I told him with all this information that I have gathered that his reason was not sufficient and that he had led me to believe that he just didn't want to do the job and was not going to do it."

Second, nothing in the timing of the warning is indicative of animus toward any protected activity. Although this alleged "protected activity" occurred on the morning of May 31, Harmon's utter failure to do the job he was assigned continued throughout the entire day of May 31, and it was only on the following day, June 1, that he was issued a warning.

Third, the investigation conducted by Craig Parker was careful and thorough. He spoke not only with Harmon, but with the other baggers, and he reviewed productivity reports from the previous few days when the same product had been run. There was nothing hasty or superficial about the investigation, and it was reviewed by Rowan before being issued.

Fourth, Harmon provided ample cause for a written warning. He admits that he was instructed to bag the jet mill empty and that he did not come close to doing so. He admits that when Parker came by around 10:30 a.m., he did not raise any issues with the equipment other than it was "bagging a little slow." [7] He admits that after taking his scheduled break from 9:00 a.m. to 9:15 a.m., he took an unscheduled break a mere 45 minutes later to go to the control room to get a drink. He admits that he left the jet mill from 11:00 a.m. to 11:45 a.m. to assist operators with another job even though Supervisor Skinner did not speak to him directly, there were two other operators in the control room at the time, and Parker—who had instructed him to bag the jet mill empty—was Skinner's boss. He admits that during the 5 hours of "run time" when he was actually at the jet mill, he only completed 30 50-pound bags, a total of 1500 pounds of material. That is an average of 300 pounds per hour. By way of comparison, two days earlier (May 29), in 8 hours of run time, Williams bagged 4 supersacks and 3 pallets of S-11, a total of 10,000 pounds, which is an average of 1250 pounds per hour. One day earlier (May 30), in 2 hours of run time, Peterson bagged a full pallet (40 bags) totaling 2000 pounds, an average of 1000 pounds per hour. Williams bagged 2 full pallets (80 bags) in 4 hours of run time, a total of 4,000 pounds, or 1000 pounds per hour. On the night of May 31, in 2 hours of run time, Williams bagged a full pallet (40 bags) totaling 2,000 pounds, or an average of 1,000 pounds per hour.

While Respondent does not maintain specific production quotas or standards, Harmon's performance was woeful by any measure. Indeed, it was woeful by his own prior standards. Thus, on September 9, 2015, Harmon packaged 3 pallets of 50-pound bags, totaling 6,000

[7] Although Harmon testified on direct examination that he had not bagged 50-pound bags on the jet mill in more than 6 months prior to May 31, 2016 (Tr. 128), this was proved to be false, as documentation was introduced showing that on January 15, 2016, Harmon packaged 50-pound bags for 9 hours on the jet mill. (Resp. Exh. 4; Tr. 159-160).

pounds in 5 hours, an average of 1,200 pounds per hour. (Resp. Exh. 3). On that day, he noted no problems on the productivity report. By way of contrast, on January 15, 2016, when he only completed 3 pallets of 50-pound bags, totaling 6,000 pounds in 9 hours, an average of 666 pounds per hour, he specifically noted on the productivity report that he "had to fix every bag," that it was "running super slow," and that he "had to beat on the bin and put air in it just to get it to start filling." (Resp. Exh. 4, Tr. 160-161). On May 31, 2016, when he noted no problems whatsoever on his report, Harmon was more than 50% less productive than he was on January 15, 2016 when the jet mill was running as poorly as one can imagine.

The absence of specific standards does not preclude an employer from taking disciplinary action when an employee deliberately shirks his assigned duties. Indeed, Respondent's work rules and corrective action policy (Jt. Exh. 10) establish three levels of offenses with Level I being the most serious and Level III being the least serious. Performance issues are addressed in all three levels, depending upon the seriousness and consequences of the specific performance issue. Level I offenses, which typically start with a verbal warning, are defined as "[c]onduct that may be detrimental to [the Company's] productivity or performance," and include: (1) "Failure to follow instructions or procedures;" (2) "Failure to meet quality/quantity standards;" and (3) "Failure to properly perform assigned duties or job responsibilities." Level II offenses, which typically start with a written warning, are defined as "[a]ctivities that place [the Company] and its employees in a position of potential liability," and include "Failing to follow proper procedure or quality/quantity standards, thereby creating an undue hardship on the Company in regard to cost, time or customer satisfaction." Level III offenses, which "may result in immediate discharge," are defined as "[a]ctivities that place [the Company's] reputation, assets, or employees in immediate danger or harm," and include "Deliberate failure to follow procedures;

e.g., quality/quantity standards, security, safety, etc." Although there clearly was a deliberate element to Harmon's failure to do as instructed, Respondent reasonably chose to classify his conduct as a Level II offense, i.e., one that "creat[ed] an undue hardship on the Company in regard to cost, time, or customer satisfaction." It is not disputed that Respondent could not effectuate the changeover from S-11 product to Coat 7 product until the jet mill was bagged empty of S-11. The production plan called for the jet mill to be empty on May 31, and for 14 tons of Coat 7 to be produced on June 1. However, the jet mill was not empty until the afternoon of June 1. As a result, only 4 tons of Coat 7 was produced on June 1. This product was intended for NGK, an important and strategic customer. As Supervisor Parker explained, Respondent sends two to three trucks each week to NGK so that NGK can maintain a one-month stock in its warehouse. Once Respondent falls behind in deliveries by more than 10 tons, it can result in NGK's warehouse running out of product. (Tr. 223-224). Thus, Harmon's failure to bag the jet mill empty as instructed placed Respondent behind schedule and had the potential to jeopardize Respondent's relationship with NGK.

Fifth, Harmon is not the only employee who has received discipline for poor performance and/or failure to follow instructions. The record contains numerous examples of such discipline. It appears, however, that the General Counsel intends to make two contentions regarding this disciplinary past practice. First, the General Counsel appears to contend that this is the first time any employee has received discipline for poor performance on the jet mill. That argument, however, fails because there is no probative evidence that any employee has ever engaged in conduct on the jet mill that was even remotely comparable to Harmon. Also, Respondent's rules and policies do not turn on where the poor performance occurs, nor do they differentiate the jet mill from any other area. The second argument may be that some employees received lesser

discipline in the form of a verbal warning for performance related issues. But the General Counsel must do more than simply place in the record a few verbal coachings and warnings for poor performance or failure to follow instructions. It is well settled that the Board " 'cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1171 n. 6 (2000); *see George L. Mee Memorial Hospital*, 348 NLRB 327, 332 (2006). The General Counsel's burden is to establish actual disparity, i.e., that "similarly situated" employees received lesser discipline. *Pacific Maritime Assoc.*, 321 NLRB 822, 824 n. 7 (1996). This is particularly true inasmuch as Respondent's work rules draw distinctions between disciplinary levels that require management to exercise judgment and discretion. In such circumstances, where cause for discipline has been established, the Board does not question management's exercise of discretion in deciding the appropriate level of punishment, at least absent "blatant disparity." *Fluor Daniel, Inc.*, 304 NLRB 970, 970-971 (1991), *enf'd*, 980 F.2d 1449 (11th Cir. 1992) (Table). A "blatant" disparity is a disparity of such proportion "as to admit of no other interpretation than that the employer bore animus against the protected activity." *Tomatek, Inc.*, 333 NLRB 1350, 1364 (2001). It is disparity that is "completely obvious, conspicuous, or obtrusive especially in a crass or offensive manner." *Merriam-Webster's Online Dictionary*. Here, there is no showing of disparity, much less, blatant disparity.

The examples submitted by the General Counsel do not clearly involve "similarly situated" employees. Harmon's failure to complete the task assigned him was deemed conscious and deliberate and it had an actual deleterious effect on the planned work schedule, delaying the transition from S-11 to Coat 7 product. None of the disciplines introduced into evidence by the General Counsel (GC Exhs. 9-24) contain any indication that management viewed the

employee's conduct as a conscious and deliberate refusal to follow instructions or proper procedures. This in itself precludes a finding that these employees were "similarly situated" to Harmon. Further, with the exception of Glen Bailey (GC Exh. 23) and Mike Halpain (GC Exh. 24), the documents do not reflect that there were any specific deleterious effects. In each of these cases, however, it appears that the offense was a negligent failure to verify that something had been done rather than a conscious refusal to follow instructions. The General Counsel offered no testimonial evidence to establish that any of these incidents were remotely similar to Harmon.

Further, Respondent introduced evidence of other employees receiving written warnings even when they had no active disciplines. For example, on December 28, 2015, Charles Kirtley, a bagger, was issued a written warning for not completing an Auger order as instructed. The supervisor's notes indicated that this caused a delay in starting another order and that Kirtley offered no plausible explanation. Kirtley had no active discipline at the time. (Resp. Exh. 15).[8] This incident, on its face, appears to bear the most similarity to what Harmon did. In essence, Kirtley flaunted his supervisor's instructions to complete a bagging job, thereby delaying the start-up of a different job. On October 21, 2016, Jake Garner received a written warning for "mistakenly using the wrong filter cloth," resulting in the cloth having to be replaced. Garner had no active discipline at the time. (Resp. Exh. 14).

For all these reasons, Respondent contends that the General Counsel failed to establish a prima facie case of discrimination, and the allegation regarding the written warning issued to Brandon Harmon should be dismissed. Assuming, *arguendo*, that the General Counsel

[8] The other employee, Justin Lane, received a verbal warning, (GC Exh. 20), apparently because he actually completed 2 pallets at the jet mill (as instructed) and 1 pallet at the Auger, whereas Kirtley did little, if any, identifiable work. (Resp. Exh. 15).

established a prima facie case, it was an exceedingly weak case, and Respondent easily established its Wright Line defense.

2. Respondent Established Its Wright Line Defense.

Although the Wright Line defense requires an employer to establish that it would have terminated the employee in spite of the employee's union activities, the employer need do so only by a preponderance of the evidence, not as a matter of certainty. "Nothing in the Board's *Wright Line* decision indicates that the employer's burden cannot be met by using circumstantial, as opposed to direct, evidence," *Centre Property Management v. NLRB,* 807 F.2d 1264, 1269 (5th Cir. 1987), and "[t]he Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it." *Merrillat Industries*, 307 NLRB 1301, 1303 (1992). The employer's burden is not unduly onerous, and it need not show that it has "acted with perfect consistency through the years." *Consolidated Biscuit Co.*, 346 NLRB No. 101, n.24 (2006). While there may be other ways of establishing the Wright Line defense, the most common means is by proof of a good faith belief that the employee violated an established rule or policy and either (1) proof that the rule or policy permitted discipline, coupled with the General Counsel's failure to establish meaningful Section 7 disparity, *McClatchy Newspapers, Inc., d/b/a The Fresno Bee,* 337 NLRB 1161 (2002) (employer established Wright Line defense by establishing that employee violated established no-sleeping rule that provided for "disciplinary action and/or termination," even though no evidence of past practice); *Tom Rice Buick, Pontiac & GMC Truck, Inc.*, 334 NLRB 785 (2001) (employer established Wright Line defense, despite strong prima facie case, by presenting evidence that employer violated generally known (but unwritten) policy against leaving early without notification and General Counsel offered no evidence of disparity), or (2) proof that the rule or policy had been relied on in the

past to discipline employees, coupled with the General Counsel's failure to establish meaningful Section 7 disparity. *Merillat Industries, Inc.*, 307 NLRB 1301, 1303 (1992) ("In the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent met that standard by demonstrating that it has a rule requiring discharge for attempting to remove property of the Respondent from the plant without permission, and that the rule has been applied to employees in the past"); *A&T Manufacturing Co.*, 276 NLRB 1183, 1184 (1985) (same).

Here, Respondent clearly established the following: It maintained written rules regarding poor performance and the failure to follow instructions. Harmon was upset at being asked to perform as a bagger, and he consciously rebelled by doing as little as humanly possible. He admitted that he did not bag the jet mill empty as instructed. Harmon offered no plausible explanation for his failure to complete the assigned job. Respondent carefully investigated and reasonably classified Harmon's actions as a Level II violation. Other employees had received similar discipline, and in the case that bears the most similarity to Harmon, employee Charles Kirtley was also issued a written warning. While some employees received verbal warnings for performance issues, the General Counsel failed to establish that they were similarly situated to Harmon. In these circumstances, Respondent has established its Wright Line defense.

CONCLUSION

Respondent requests that the Consolidated Complaint be dismissed in its entirety.

Dated this 19th day of May 2017.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day, May 19, 2017, I served the foregoing POST HEARING BRIEF on the following parties of record in the manner indicated below:

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